

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

MARVIN L. CARTER,

Plaintiff,

v.

JUDGE TIMOTHY WITKOWIAK and
FREDERICK KLIMETZ,

Defendants.

Case No. 17-CV-1270-JPS

ORDER

Plaintiff, a prisoner proceeding *pro se*, filed a complaint under 42 U.S.C. § 1983 alleging that his civil rights were violated. (Docket #1). This matter comes before the Court on Plaintiff's motion to proceed *in forma pauperis*. (Docket #2). Plaintiff has been assessed and paid an initial partial filing fee of \$31.26. 28 U.S.C. § 1915(b)(4).

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. *Id.* § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Denton v. Hernandez*, 504 U.S. 25, 31 (1992); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Gladney v. Pendelton Corr. Facility*, 302 F.3d 773, 774 (7th Cir. 2002). The Court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual

contentions are clearly baseless. *Neitzke*, 490 U.S. at 327; *Gladney*, 302 F.3d at 774. “Malicious,” although sometimes treated as a synonym for “frivolous,” “is more usefully construed as intended to harass.” *Lindell v. McCallum*, 352 F.3d 1107, 1109 (7th Cir. 2003); *Paul v. Marberry*, 658 F.3d 702, 705 (7th Cir. 2011).

To state a cognizable claim under the federal notice pleading system, the plaintiff is required to provide a “short and plain statement of the claim showing that [he] is entitled to relief[.]” Fed. R. Civ. P. 8(a)(2). It is not necessary for the plaintiff to plead specific facts; his statement need only “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *Christopher v. Buss*, 384 F.3d 879, 881 (7th Cir. 2004). However, a complaint that offers “‘labels and conclusions’” or “‘formulaic recitation of the elements of a cause of action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). To state a claim, a complaint must contain sufficient factual matter, accepted as true, “‘that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The complaint allegations “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555; *Christopher*, 384 F.3d at 881.

In considering whether a complaint states a claim, courts should first “identif[y] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679. Legal conclusions must be supported by factual allegations. *Id.* If there are well-

pleaded factual allegations, the Court must “assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that: (1) he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was visited upon him by a person or persons acting under color of state law. *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The Court is obliged to give Plaintiff’s *pro se* allegations, “however inartfully pleaded,” a liberal construction. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

Plaintiff complains about the allegedly ineffective assistance of counsel he received during a state prosecution from his state-appointed public defender, Defendant Frederick Klimetz (“Klimetz”). (Docket #1 at 2–4). Apparently, Klimetz refused to file a particular motion at Plaintiff’s behest. *Id.* After several inquiries from Plaintiff, Klimetz reported that the judge assigned to his criminal case, Judge Timothy Witkowiak (“Witkowiak”), had instructed Klimetz not to file the motion. *Id.* at 4–5. Plaintiff seeks compensatory and punitive damages from both Klimetz and Judge Witkowiak, alleging that their conduct in refusing to entertain his motion violated his due process rights under the Fifth Amendment and his right to the effective assistance of counsel under the Sixth Amendment. *Id.* at 7–8.

Plaintiff’s complaint fails to state a claim against either Defendant. First, his claims against Klimetz are not cognizable in a Section 1983 case. Even though Klimetz may have been employed by the state, a court-appointed defense attorney does not “act[] under color of state law” when representing an indigent defendant in a state criminal proceeding. *Polk*

County v. Dodson, 454 U.S. 312, 325 (1981); *Swift v. Swift*, 556 F. App'x 509, 510–11 (7th Cir. 2014). Second, Judge Witkowiak enjoys absolute immunity for actions taken in his judicial capacity. *Loubser v. Thacker*, 440 F.3d 439, 442 (7th Cir. 2006). Even if the judge was mistaken to direct Klimetz not to file a motion on Plaintiff's behalf, that action undoubtedly falls within the scope of his judicial duties. Consequently, because Plaintiff does not state a claim against either Defendant, this action must be dismissed.¹

Accordingly,

IT IS ORDERED that Plaintiff's motion for leave to proceed *in forma pauperis* (Docket #2) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that this action be and the same is hereby **DISMISSED** pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1) for failure to state a claim;

IT IS FURTHER ORDERED that the Clerk of Court document that this inmate has brought an action that was dismissed for failure to state a claim under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1);

IT IS FURTHER ORDERED that the Clerk of Court document that this inmate has incurred a "strike" under 28 U.S.C. §1915(g);

IT IS FURTHER ORDERED that the agency having custody of the prisoner shall collect from his institution trust account the balance of the filing fee by collecting monthly payments from the plaintiff's prison trust

¹Plaintiff reports that he was sentenced in the state case on July 20, 2017. (Docket #1 at 6). Because his complaint concerns a criminal conviction, and because he appears to believe that his unfiled motion would have, if considered, led to the dismissal of the charges against him, this action is likely barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), which holds that a claim for damages may not be pursued if its success would necessarily imply the invalidity of the criminal conviction or sentence. The Court need not reach that issue, however, as other unassailable reasons for dismissal exist.

account in an amount equal to 20% of the preceding month's income credited to the prisoner's trust account and forwarding payments to the Clerk of Court each time the amount in the account exceeds \$10.00 in accordance with 28 U.S.C. § 1915(b)(2). The payments shall be clearly identified by the case name and number assigned to this action. If the prisoner is transferred to another institution, county, state, or federal, the transferring institution shall forward a copy of this Order along with the prisoner's remaining balance to the receiving institution;

IT IS FURTHER ORDERED that a copy of this order be sent to the officer in charge of the agency where the inmate is confined; and

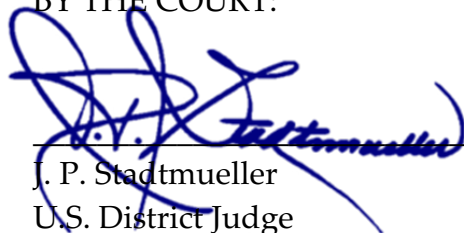
IT IS FURTHER ORDERED that copies of this order be sent to the warden of the institution where the inmate is confined and to Corey F. Finkelmeyer, Assistant Attorney General, Wisconsin Department of Justice, P.O. Box 7857, Madison, Wisconsin, 53707-7857.

THE COURT FURTHER CERTIFIES that any appeal from this matter would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3) unless the plaintiff offers *bona fide* arguments supporting his appeal.

The Clerk of the Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 18th day of October, 2017.

BY THE COURT:



J. P. Stadtmueller
U.S. District Judge